

REST IN PEACE, NEWMAN – SO WILL THE GOVERNMENT LAY DOWN IN SALMAN?

October 5, 2015 | [Insider Trading](#), [The GEE Blog](#)



Brian E. Casey
Partner

This morning, the U.S. Supreme Court finally put to an end to the government's efforts to reverse the Second Circuit's decision in *United States v. Newman*. As this blog predicted it might ([August 11, 2015](#)), the Supreme Court denied the government's petition for writ of certiorari. As a result, the Second Circuit's decision vacating the convictions of Newman and Chiasson stands. As is the court's custom, it did not explain its decision. As a result, if the government was not being hyperbolic in its petition for certiorari, the Second Circuit – home to most of the insider trading prosecutions in the country – has raised the bar for insider trading prosecutions higher than any other circuit in the country, created a standard that conflicts with traditional insider trading jurisprudence, “profoundly destabilize[d]” the law governing securities markets and caused “significant harm” to antifraud enforcement. So, where does that leave the government? We could find out fairly soon in the Ninth Circuit case we have discussed previously, *United States v. Salman*. ([July 15, 2015](#)). In that case, Judge Rakoff, sitting by designation as a Ninth Circuit judge, used a more traditional, prosecution-friendly approach to insider trading to affirm several insider trading convictions. Commentators, and Judge Rakoff himself (speaking for the panel), have differed on the extent to which *Salman* conflicts with *Newman*. Some, including the Justice Department in its *Newman* Supreme Court briefing, have argued that *Newman* conflicts with *Salman* and that this “circuit split” provided a reason to grant certiorari in *Newman*. Others have downplayed the severity of the difference between the *Newman* and *Salman* approaches. The *Salman* defendants' petition for rehearing was denied on Aug. 13, so they have until about Nov. 13 to file their petition for writ of certiorari with the Supreme Court. While they most likely would have petitioned anyway, the denial of the *Newman* petition makes a petition all the more certain. And while this is merely reading tea leaves, one could read the denial as giving the *Salman* defendants a greater chance of the Court granting cert. As we discussed previously, *Salman* raises the “personal benefit” issue more cleanly than *Newman*. It is outcome-determinative in *Salman* whereas it was not in *Newman*. Moreover, since the Government itself argued that *Newman* and *Salman* created a circuit split, it would be hard-pressed to disavow that argument in response to *Salman*'s inevitable argument that a circuit split actually exists. Of course, from the opposite perspective, one might look at the *Newman* denial as the Supreme Court concluding that the two cases did not create a split worthy of Supreme Court review. But even circuit splits can go unreviewed if more appropriate vehicles are waiting in the wings. This leaves the government in an interesting position. Under ordinary circumstances, it would oppose the *Salman* defendants' petition for certiorari

RELATED PRACTICE AREAS

Financial and Regulatory Litigation
Government Litigation
Securities and Capital Markets
White Collar and Investigations

RELATED TOPICS

Newman

to protect its conviction and support the broader view of insider trading. (In some instances, parties winning in the appellate court do not oppose a petition for certiorari to give the impression that the petition is so insubstantial that it does not merit a response. However, given the government's position in *Newman*, that seems unlikely). But here, if *Newman* has the destabilizing impact that the government claims, even the government may want the Supreme Court to address insider trading sooner rather than later. *Salman* would provide the next vehicle to do so. Otherwise, the government might have to live with *Newman* for years until a circuit split deepened. The government therefore might file a fairly unconventional response to the *Salman* petition. It potentially could argue that *Salman* was right, but the court should nonetheless hear the case. Doing so obviously has risk, particularly since about two-thirds of cases accepted by the court are reversed. But arguing against certiorari in *Salman* means that the government must: (1) disavow its recent argument that a circuit split existed; and (2) live with *Newman* for the foreseeable future. That may be too bitter a pill for the government to swallow. We'll see what happens in mid-November when, presumably, the *Salman* defendants file their petition.